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The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem

I. INTRODUCTION

A recent South Carolina case has focused the public's attention on a growing trend in criminal law—the imposition of criminal sanctions against women whose drug abuse during pregnancy results in the injury or death of their fetuses or newborns. On July 15, 1996, in *Whitner v. State*, the South Carolina Supreme Court cleared the way for criminal prosecution of mothers for abusive prenatal conduct that endangers the fetus.¹ It was the first state high court in the nation to make such a declaration.² In so ruling, the court reversed a lower court decision which stated that a mother could not be found guilty of criminal child neglect for causing her baby to be born with cocaine metabolites in its system after she ingested crack cocaine during her third trimester of pregnancy.³ Writing for the majority, Justice Toal concluded that South Carolina case law⁴ and the plain language of its child neglect statute⁵ clearly supported the charges of criminal child neglect in the case.⁶ The court also noted that the policy of the Children's Code, "the prevention

1. *Whitner v. State*, No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

2. *See id.*

3. *See id.* at *6.

4. *See id.* The Court pointed out that South Carolina law had long recognized that viable fetuses are "persons holding certain legal rights." *Id.* at *2; *see State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984) (stating that an action for homicide for the killing of an unborn child may be maintained when it is proven beyond a reasonable doubt that the fetus was viable at the time it was killed); *Fowler v. Woodward*, 138 S.E.2d 42, 43 (S.C. 1964) (stating that a complaint alleging that an infant who, while in its eighth month of gestation, died when its mother died in an automobile collision and related fire caused by the negligence and willful misconduct of the defendant stated a valid cause of action for wrongful death of the child even though it failed to allege that the child had been born alive and died thereafter); *Hall v. Murphy*, 113 S.E.2d 790, 793 (S.C. 1960) (stating that "a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may, after birth, maintain an action for such injuries").

5. Under the statute, "child" is defined as a "person under the age of eighteen." S.C. CODE ANN. § 20-7-30(1) (Law Co-op. 1985).

6. *See Whitner*, 1996 WL 393164, at *2-3.

of children's problems," further supported its interpretation.⁷ The court stated:

The abuse or neglect of a child at any time during childhood can exact a profound toll on the child herself as well as on society as a whole.

However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth.⁸

It is easy to see how compassion and frustration might have influenced the legal judgment of the three South Carolina justices in the three-to-two *Whitner* decision.⁹ It is estimated that between 350,000 and 739,200 infants are born each year exposed to drugs in utero.¹⁰ Furthermore, approximately 11% of all women have used illegal drugs while pregnant, and of those 11%, 75% used cocaine during a pregnancy.¹¹ Cocaine use exposes individuals to such risks as prenatal strokes and seizures, premature birth, retarded fetal growth, and organ malformations.¹² The in-

7. See *id.* at *3. South Carolina Code section 20-7-20(C), which describes South Carolina's policy concerning children, expressly states: "It shall be the policy of this State to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented on behalf of children and their families." S.C. CODE ANN. § 20-7-20(C) (Law Co-op 1985).

8. *Whitner*, 1996 WL 393164, at *3.

9. See *id.* Justice Toal delivered the opinion of the court. See *id.* at *1. Justices Waller and Burnett concurred in the majority opinion which declared that the word "child," as used in the child abuse and endangerment statute in the South Carolina Children's Code, included viable fetuses. See *id.* at *7. Chief Justice Finney wrote a separate dissenting opinion which contended that a reading of the entire child abuse statute demonstrates that the General Assembly intended to criminalize only acts directed at children, not fetuses. See *id.* at *8 (Finney, C.J., dissenting). Justice Moore also wrote a dissenting opinion in which he argued that it is the province of the General Assembly to criminalize the conduct at issue. See *id.* at *9 (Moore, J., dissenting).

10. See Deborah Rissing Baurac, *Cocaine Babies: Researchers Optimistic About Normal Childhoods*, CHI. TRIB., Mar. 7, 1993, at 11. Although such numbers denote the severity of drug use during pregnancy, Dr. Ira Chasnoff and other researchers at the National Association for Perinatal Addiction Research and Education in Chicago found that early intervention can help some cocaine babies. See *id.* The babies in Dr. Chasnoff's study who had been prenatally exposed to illicit drugs tended to have lower intelligence test scores than peers who had not been exposed. See *id.* Additionally, the study revealed that those drug-exposed babies that had early intervention to help them focus their attention and control their behavior consistently scored higher than drug-exposed children who did not receive those services. See *id.*

11. See Julia Elizabeth Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1160 (1992).

12. See Ira J. Chasnoff et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 665, 666-69 (1985); Helene M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666 (1990) (explaining that infants who have

creasing number of babies born with cocaine in their systems heightens the frustration of the health care and legal communities in finding possible solutions to the problem.¹³ A significant philosophical disagreement exists, however, regarding the best way to respond to this complex social problem.¹⁴

Opponents of intervention assert that criminal prosecution will do more harm than good.¹⁵ They maintain that if the legal system punishes pregnant drug users, the fear of facing criminal charges will deter pregnant women from seeking prenatal care.¹⁶ Women's rights advocates assert that the most effective approach is to enable women to receive prenatal care without the threat of criminal prosecution.¹⁷ Additionally, they argue that criminal or civil liability for prenatal conduct is a violation of a woman's right to bodily integrity and self-determination.¹⁸

Proponents of criminal intervention focus on the issue of the culpability of the pregnant woman.¹⁹ Regardless of whether or not criminal intervention actually provides a deterrent, those favoring prosecution want to

been exposed to cocaine in utero have severe problems, such as rapid heart rates, below average weight, and decreased immune systems).

13. This Comment addresses the issue of maternal substance abuse by focusing primarily on cocaine, however the same arguments are applicable to other substances.

14. See Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 JAMA 1556, 1556-57 (1991) (stating that political controversies such as the legal status of the fetus and the criminalization of addiction have fueled the debate that is usually polarized between therapy or sanction).

15. See Barbara Kantrowitz et al., *The Pregnancy Police*, NEWSWEEK, Apr. 29, 1991, at 52. Women's organizations, such as the National Organization of Women (NOW), have attacked legislation that regulates a pregnant woman's behavior. See *id.* NOW considers such legislation the first step in creating a pregnancy-police state. See *id.* The American Civil Liberties Union (ACLU) argues that prosecution of pregnant women will not only fail to deter drug use during pregnancy, but will also create a precedent for prosecuting a wide array of harmful prenatal conduct, such as maintaining poor sleep habits, and failing to follow a doctor's orders. See *id.* at 53.

16. See *id.*

17. See *id.* at 52.

18. See generally Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987).

19. For analysis in support of imposing criminal sanctions against pregnant drug users, see Natasha C. Lisman, *Substance Abuse During Pregnancy: A Case for State Intervention to Protect Children from Prenatally Caused Harm*, 34 BOSTON B.J. 26 (1990); Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745 (1990); Rorie Sherman, *Keeping Baby Safe From Mom*, 11 NAT'L L.J. 1 (1988).

hold the woman criminally liable for prenatal behavior that damages a fetus.²⁰

This Comment challenges the current trend in criminalizing maternal substance abuse in terms of both the nature of the problem and the effectiveness of the solution. Part II discusses the historical development of fetal rights and the ensuing impact on the privacy rights of pregnant women.²¹ Part III examines the criminal statutes that prosecutors currently use to impose liability on drug-dependent mothers.²² Additionally, Part III examines the various reasons why prosecution does not effectively solve the problem of maternal substance abuse.²³ Part IV addresses the virtual absence of drug treatment programs available to pregnant women.²⁴ Part IV also discusses the lack of child care available to these women as they combat their drug addiction.²⁵ Finally, this Comment concludes that if the goal is to promote the birth of healthy children, the imposition of criminal sanctions is the wrong approach because alternative strategies exist for decreasing fetal exposure to illicit drugs and for strengthening the bond between a mother and child.²⁶

II. THE DEVELOPMENT OF FETAL RIGHTS

The concept of fetal rights, the idea that a fetus has separate interests that are equal to or even greater than those of a pregnant woman, has had an interesting evolution. Historically, the fetus lacked rights as a separate entity apart from the mother because the legal system treated the fetus as part of the woman.²⁷ In 1973, the Supreme Court declared that a fetus is not a "person" for the purpose of the Fourteenth Amendment's protection of life, liberty and the pursuit of happiness.²⁸ Conse-

20. See *supra* note 19.

21. See *infra* notes 27-111 and accompanying text.

22. See *infra* notes 112-54 and accompanying text.

23. See *infra* notes 155-87 and accompanying text.

24. See *infra* notes 188-212 and accompanying text.

25. See *infra* notes 213-20 and accompanying text.

26. See *infra* notes 221-36 and accompanying text.

27. See *Dietrich v. Northampton*, 138 Mass. 14, 17 (1884), *overruled by* *Torrigan v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967) (holding that a woman could not recover for the death of her unborn child after an accident caused premature delivery); see also Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

28. See *Roe v. Wade*, 410 U.S. 113, 162 (1973). In *Roe*, the Supreme Court held that a viable fetus is not a person, and thus cannot receive protection under the Fourteenth Amendment. See *id.* at 158. The Court also held that the decision whether or not to terminate a pregnancy falls within the constitutionally protected right of privacy. See *id.* at 152-53.

quently, the legal system remained hesitant to grant legal rights to the fetus.²⁹ The Supreme Court also recognized, however, that the state has an interest in potential life that is to be weighed against the woman's autonomy rights.³⁰

In analyzing these competing interests, fetal rights advocates conclude that the rights of the fetus should take precedence.³¹ Some courts have endorsed this view by going so far as to order pregnant women to undergo medical treatment, including surgery, against their will when the court ascertains that the women's previous medical decisions were not made in the best interest of the fetus.³² In addition to ordering medical treatment, courts directly intervene in the lives of pregnant women by allowing hospitals to detain pregnant women who refuse medical treatment for health conditions unrelated to pregnancy.³³ Fetal rights advocates

29. See *id.* at 161. The *Roe* Court afforded legal rights to fetuses in narrowly defined situations and these rights were contingent upon a live birth requirement. See *id.* The live-birth requirement acknowledged the child's existence prior to birth as a fetus in the mother's womb and was consistent with the concept that the fetus was an extension of the woman. See *id.*

30. See *id.* at 162. According to the Supreme Court in *Roe*, two compelling state interests justified limiting a woman's right to terminate her pregnancy. See *id.* First, the state has an interest in protecting women's health. See *id.* at 148-50, 163. Second, the state has an interest in protecting potential human life. See *id.* at 150-51, 163-64. Under *Roe*, during the first trimester of pregnancy, the state's interests are never compelling, and the state may not intervene in a woman's decision to abort. See *id.* at 164. After the first trimester, the state has a compelling interest in women's health which it may protect by regulating abortion. See *id.* at 163 (reasoning that a first-trimester abortion is safer than childbirth, but a second-trimester abortion may be more dangerous than childbirth). At viability, which the *Roe* court deemed to occur at the beginning of the third trimester, the state's interest in protecting human life becomes compelling, and the state may prohibit an abortion not necessary to save the life or health of the woman. See *id.* at 162-64.

31. For a commentary supporting state intervention aimed at protecting the fetus, see Sam S. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1234-38 (1987) (balancing the interests of the mother and the fetus and determining that the state's primary responsibility is owed to the fetus); see also Judith Kahn, Note, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus—Is This a Mother's Crime?*, 53 BROOK. L. REV. 807, 842-43 (1987) (recognizing a need to balance a pregnant woman's fundamental privacy rights with the state's duty to protect the fetus).

32. See Veronika E.B. Holder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1194-96 (1987); see also Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951, 1960-63 (1986).

33. See Holder et al., *supra* note 32, at 1194-96 (commenting on the judicial inter-

assert that children should be able to bring legal claims against their mothers for "prenatal injuries."³⁴ In some industries, employers have adopted "fetal protection" policies which bar fertile women of childbearing age from certain high-paying, unionized jobs.³⁵

A. Traditional Fetal Interests

Historically, an unborn child was legally inseparable from the mother, and state common law afforded a child no legal protection prior to birth.³⁶ There are two frequently offered explanations for the live-birth requirement. First, fetuses are separate from the mother only after birth, and therefore, only require protection of the law after birth.³⁷ Second, traditionally, it was medically impossible for a fetus to survive outside of the mother's womb.³⁸ Due to advances in medical technology and a retreat in the line of viability,³⁹ a determined movement for recognition of fetal rights began.⁴⁰ This movement seeks to define the fetus as a person and to hold the woman legally liable for the fetus's well-being.⁴¹ Ad-

est of protecting the fetus).

34. See John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 441 (1983) (maintaining that because the doctrine of parental immunity is eroding, it is consistent to allow a child to sue its mother for prenataly sustained injuries). *But cf.* Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988) (stating that a child cannot maintain a lawsuit against its mother for unintentional infliction of injuries suffered while in the womb).

35. See generally Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981) (discussing Title VII and how to fashion a fetal protection employment policy which is consistent with the goals of Title VII). See, e.g., *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that a fetal protection policy violated Title VII's prohibition on sex discrimination).

36. See Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1657 (1979) (noting that live-birth provided an "adequate and uncomplicated standard").

37. See *id.*

38. See *id.*

39. See Charles Marwick, *Coming to Terms With Indications for Fetal Surgeries*, 270 JAMA 2025, 2026-27 (1993) (stating that recent remarkable advances in medical technology have made the United States the leader in diagnostic, medical, and surgical intervention in the treatment of infants in utero); see also George J. Annas, *The Impact of Medical Technology on the Pregnant Woman's Right to Privacy*, 13 AM. J.L. & MED. 213, 213-32 (1989) (stating that diagnostic tools such as ultrasonography, amniocentesis, or chronic villus sampling can be used to detect fetal abnormalities that, in some cases, may be treated through prenatal therapy or fetal surgery).

40. See Johnsen, *supra* note 27, at 605 (commenting that the fetus has been conceptualized as an entity independent of the woman).

41. For analysis opposing the expansion of fetal rights, see Robert Holland, *Criminal Sanctions for Drug Abuse During Pregnancy: The Antithesis of Fetal Health*, 8

vocates of fetal protection have succeeded in gaining greater protection of the fetus in various areas of the law.⁴² The reason for the expansion stems from the fact that some courts are more willing to recognize the fetus in a context not contingent upon live birth.⁴³

1. Inheritance and Trust Law

The common law has been slow to recognize the rights of an unborn child.⁴⁴ It was only under the laws of inheritance that an unborn child was first recognized as a "person" entitled to legal protection.⁴⁵ Although the right to inherit property is not "perfected" until there is a live birth, inheritance laws recognize that an unborn child is capable of acquiring property interests.⁴⁶ Under these laws, live-born children qualify for their inheritance share, even if they were only in utero at the time of the testator's death.⁴⁷ Similarly, in trust law, a beneficiary need only be ascertainable within the period of the Rule Against Perpetuities.⁴⁸ It is not necessary that the beneficiary be alive or even known at the time the trust is created.⁴⁹ Additionally, to protect the unborn beneficiary's interest in the trust, the guardian may bring suit on behalf of the unborn child.⁵⁰

N.Y.L. SCH. J. HUM. RTS. 415 (1991); Nancy K. Schiff, Note, *Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197 (1991).

42. See David H. Montague & Sharon McLaughlin, *Drug Exposed Infants: En Ventre Sa Mere and in Need of Protection*, 44 BAYLOR L. REV. 485, 490-97 (1992) (stating that fetal protection has evolved over the years in the areas of inheritance, tort, and criminal law).

43. See Johnsen, *supra* note 27, at 600-04 (discussing the live-birth requirement for acquisition of legal rights and the subsequent development of fetal rights).

44. See Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 279 (1988) (commenting that any assertable interest in the fetus is a recent development).

45. See Johnsen, *supra* note 27, at 601-02.

46. See Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not To Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 264-65; see also *Roe v. Wade*, 410 U.S. 113, 161 (1973).

47. See McNulty, *supra* note 44, at 279 n.8 (noting that protecting the inheritance rights of the fetus was the exception rather than the rule).

48. RESTATEMENT (SECOND) OF TRUSTS § 112 (1957).

49. See *id.* cmt. a.

50. See *id.* § 214 cmt. a.

2. Tort Law

Despite an early recognition of fetal rights in property law, legal recognition of the fetus in tort law is a more modern development. Tort claims for prenatal injuries emerged as medical technology improved and it became possible for a fetus to survive outside the mother's womb at an earlier stage of development.⁵¹ Today, all American jurisdictions allow a fetus, subsequently born alive, to bring a tort cause of action against a third party for prenatal injuries.⁵² Additionally, most jurisdictions extend the rights of the fetus under tort law to include a right of recovery under a wrongful death claim if the fetus was viable and would have had standing to maintain an action for personal injuries had it lived.⁵³ Although a few jurisdictions allow recovery for all injuries sustained from the time of conception as long as the child is later born alive,⁵⁴ most states limit recovery to injuries sustained after the point of viability.⁵⁵

The vast majority of prenatal tort cases involve third-party liability. While some courts impose third-party liability, most remain reluctant to extend prenatal tort liability to women who tortiously injure their fetuses.⁵⁶ However, some legal scholars advocate the extension of prenatal tort liability in the area of maternal substance abuse.⁵⁷ The two reported

51. See *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (D.D.C. 1946). This was the first case to extend tort protection to viable fetuses, and to reject the common law view that a fetus is so intimately united with its mother that it is a part of her. See *id.* For a more in-depth discussion of this case, see McNulty, *supra* note 44, at 280-82.

52. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984) (stating that in every jurisdiction, children born alive are permitted to maintain causes of action for consequences of prenatal injuries).

53. See *King*, *supra* note 36, at 1662-63 nn.70-74; see also *Hernandez v. Garwook*, 390 So. 2d 357, 359 (Fla. 1980) (holding that no cause of action was established under the Wrongful Death Act for the death of a stillborn child); *Raymond v. Bartsch*, 447 N.Y.S.2d 32, 33 (N.Y. Sup. Ct. 1981) (holding that a mother could not recover for the loss of a fetus as the result of an auto accident).

54. See Ron Beal, "Can I Sue Mommy?" *An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 357-69 (1984).

55. See *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 365 S.E.2d 909, 912 (N.C. Ct. App. 1988) (stating that parents had a claim for wrongful death of their stillborn child, however, recovery was limited to cases where the fetus was viable). But see *Smith v. Brennan*, 157 A.2d 497, 504 (N.J. 1960) (stating that there is no reason for denying recovery for prenatal injury because it occurred before the infant was capable of a separate existence).

56. See Balisy, *supra* note 31, at 1236-37 (recommending the adoption of prenatal tort liability); see also Sandra A. Garcia, *Drug Addiction and Mother/Child Welfare*, 13 J. LEG. MED. 129, 141 (1992) (noting that advocates of maternal, prenatal tort liability must address several complicated issues).

57. See Balisy, *supra* note 31; see also Garcia, *supra* note 56.

cases that addressed the issue came to different results. In the frequently cited case of *Grodin v. Grodin*,⁵⁸ the Michigan Court of Appeals held a mother of a child, whose teeth were discolored due to her prenatal use of tetracycline, to the same standard as a third-party tortfeasor, allowing the child to recover damages if the mother's conduct was found to be unreasonable.⁵⁹ For the most part, other jurisdictions take a different position than that stated by the *Grodin* court. In *Stallman v. Youngquist*,⁶⁰ the Illinois Supreme Court declined to follow *Grodin*, and held that a child could not assert a cause of action against her mother when her mother's negligent driving resulted in prenatal injury.⁶¹ Although an Illinois appellate court previously allowed a child to recover against its mother following *Grodin*, the Illinois Supreme Court overruled the decision, emphasizing that "[a] legal duty to guarantee the mental and physical health of another has never before been recognized in law."⁶² The court reasoned that allowing the child to recover is akin to treating the mother as a stranger to her fetus, thereby creating an adversarial relationship between mother and child.⁶³ Accordingly, the court concluded that the best way to ensure healthy babies is not the imposition of tort liability, but "before-the-fact education of all women and families about prenatal development."⁶⁴

3. Criminal Law

Criminal law provides little recognition to fetal rights. Unlike tort law, criminal law is almost exclusively statutory.⁶⁵ The Model Penal Code, which serves as the model for the criminal statutes in most states, defines a "human being" as "a person who has been born and who is alive."⁶⁶ Therefore, the criminal statutes of many states do not recognize

58. 301 N.W.2d 869 (Mich. Ct. App. 1980).

59. *See id.* at 870-71 (reasoning that the mother would bear the same liability for negligent conduct as would a third person).

60. 531 N.E.2d 355 (Ill. 1988).

61. *See id.* at 355.

62. *Id.* at 359.

63. *See id.*

64. *Id.* at 361.

65. *See* W. LAFAYE & A. SCOTT, CRIMINAL LAW § 2.1, at 66 (2d ed. 1986).

66. MODEL PENAL CODE § 210.0(1) (1985). At common law, the definition of "person" for the purposes of criminal law was one who had been "born alive." *See* LAFAYE & SCOTT, *supra* note 65. The Model Penal Code simply incorporated the common law definition into its statute. *See id.*

the fetus as a protected class. The few exceptions to this are narrowly construed. For example, in 1970 the California Supreme Court refused to interpret the state's homicide statute to include a fetus within the term "human being."⁶⁷ As a result, the California legislature amended the statute to expressly expand the definition of murder to include "the unlawful killing of a human being or fetus."⁶⁸

Feticide statutes, which make the destruction of a fetus a crime parallel to homicide, recognize the right of the fetus to be protected from certain conduct.⁶⁹ Such statutes, however, are not adopted in most states.⁷⁰ Jurisdictions adopting these statutes narrowly construe them, effectively excluding maternal conduct resulting in the fetus's death.⁷¹ Furthermore, most states have refused to expand protection of the fetus under other criminal statutes.⁷² This is a result of the courts' general unwillingness to extend existing statutes beyond their intended purposes.⁷³

Nationwide, the trend is for state prosecutors to attempt to prosecute women for "fetal abuse" under a variety of criminal statutes.⁷⁴ Dismissal of such charges by appellate courts is prevalent, but in a breakthrough ruling in July 1996, the South Carolina Supreme Court became the first appellate court to uphold a woman's conviction for endangering the health of her unborn child.⁷⁵ By using criminal statutes that were not intended to be applied to this type of maternal conduct, state prosecu-

67. See *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970) (holding that an unborn, viable fetus was not a human being under California Penal Code section 187).

68. See CAL. PENAL CODE § 187 (West 1996); King, *supra* note 36, at 1663.

69. See, e.g., 38 ILL. COMP. STAT. ANN. 9/1-2 (West 1988); IOWA CODE ANN. § 707.7 (West 1979); N.H. REV. STAT. ANN. § 585.13 (1986); UTAH CODE ANN. § 76-5-201 (1990); WASH. REV. CODE ANN. § 9A.32.060 (West 1988); WIS. STAT. ANN. § 940.04 (West 1982).

70. See Michael A. Shekey, Comment, *Criminal Liability of a Prospective Mother for Prenatal Neglect of a Viable Fetus*, 9 WHITTIER L. REV. 363, 375 n.105 (1987) (noting that while five other states adopted special feticide statutes between 1830 and 1850, California did not); Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Law Makers*, 64 IND. L.J. 357, 360-61 nn.26-36.

71. See Shekey, *supra* note 70, at 380-91; Thompson, *supra* note 70, at 361 & n.34.

72. See Shekey, *supra* note 70, at 380-91.

73. See *id.*

74. State prosecutors are using criminal statutes relating to abuse and neglect, including child endangerment and aggravated child abuse, delivery or distribution of controlled substances to minors, and involuntary manslaughter. See *infra* notes 112-54 and accompanying text.

75. See *Whitner v. State*, No. 24468, 1996 WL 393164 (S.C. July 15, 1996) (holding that a mother may be criminally prosecuted for child abuse for prenatal conduct that endangers her fetus).

tors and some courts have ignored the legislative purpose behind these statutes and, in the process, have usurped the legislature's power to define what type of conduct should be criminalized.⁷⁶ As a result, criminal statutes have been misused, legislative intent has been disregarded, and judicial power and discretion have been abused. While early fetal laws primarily protected the fetus from third parties,⁷⁷ recent ones, it has been argued, "set mother and fetus against each other."⁷⁸

B. Conflict and the Constitution

As courts increase their recognition of the fetus as an individual, the potential for the imposition of criminal sanctions against women whose conduct during pregnancy results in injury or death of their fetuses increases. Accordingly, it is important to consider the serious constitutional concerns criminal charges based on prenatal conduct raise.

1. Due Process Concerns

The Due Process Clause of the Fourteenth Amendment substantially guarantees a fundamental right of privacy to all citizens of the United States.⁷⁹ The fundamental requirements of procedural due process are the "opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest and to assert before the appropriate decision-making body the reasons for such

76. See *infra* notes 117-18, 134 and accompanying text.

77. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 423 (1991). Early fetal laws contemplated the conviction of third parties such as drunk drivers and those guilty of accosting a pregnant woman. See *id.*

78. *Id.* at 424-25. Fetal laws were used by prosecutors, physicians, and husbands to haul women into court. See *id.* Pregnant women's blood was tested for drugs without their consent or notification. See *id.* Confidentiality rights were violated so that the state could gather information against pregnant women. See *id.*; see also Paul Marcotte, *Crime and Pregnancy: Prosecutors, New Drug Laws, Torts Pit Mom Against Baby*, A.B.A. J., Aug. 1989, at 14 (analyzing how the expansion of fetal rights places the mother and fetus in opposing positions); Doretta M. McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 505-07 (1990) (discussing prosecution of women who used drugs during pregnancy during the late 1980s).

79. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a state criminal abortion law that exempted from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violated the Due Process Clause of the Fourteenth Amendment).

choice."⁸⁰ Due process prohibits prosecutors and courts from interpreting or applying an existing law in an unforeseeable or unintended manner.⁸¹

A number of courts have determined that the unprecedented application of statutes, such as child abuse provisions, to prenatal conduct violates due process guarantees because women were not provided the required notice that such laws applied to fetuses or prenatal conduct.⁸² Other courts have recognized that interpreting a child abuse statute to include prenatal conduct renders the measure unconstitutionally vague because women would not know what behavior would be criminal.⁸³ Due to the various types of activities that can be considered harmful to the fetus, one appellate court stated that "[a]llowing the state to define the crime of child abuse according to the health or condition of the newborn child would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy."⁸⁴

2. The Right of Privacy

Prosecution of women for their behavior during pregnancy also implicates the right of privacy. The Supreme Court first acknowledged a privacy right in *Griswold v. Connecticut*,⁸⁵ in which the Court declared unconstitutional a statute prohibiting married couples from using contra-

80. *Trinity Episcopal Corp. v. Romney*, 387 F. Supp. 1044, 1084 (1974) (finding that a municipality's full public hearings on conversion of two land sites provided adequate opportunities for plaintiffs to express their opposition to the proposed conversion) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 336 (1950); *Giannis v. Ordean*, 234 U.S. 385, 394 (1914)); see also *Vaughn v. State*, 456 S.W.2d 879, 883 (Ala. Crim. App. 1970) (stating that, aside from all else, due process means fundamental fairness and substantial justice).

81. See *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (stating that the unforeseeable application of a traffic law deprived petitioners of due process); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (stating that the deprivation of the right of a fair warning can result from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language).

82. See, e.g., *People v. Morabito*, 580 N.Y.S.2d 843, 847 (1992) (holding that a mother's alleged ingestion of cocaine while pregnant did not endanger the welfare of a "child" because holding otherwise would violate her right to due process under federal and state constitutions).

83. See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733, 736 (Ariz. 1995) (holding that interpreting a state statute that criminalized an act injuring a child as applying to a pregnant woman's heroin usage during pregnancy which resulted in an addicted newborn would "offend due process notions of fundamental fairness and render the statute impermissibly vague").

84. *Id.* at 736-37.

85. 381 U.S. 479 (1965).

ception.⁸⁶ The Court reasoned that certain personal decisions deserved constitutional protection through the right of privacy.⁸⁷

Building on *Griswold*, later cases reinforced this privacy right as the right to be free from state interference in making decisions within the familial and procreative spheres.⁸⁸ The right of procreational freedom was extended by *Eisenstadt v. Baird*⁸⁹ to include unmarried persons.⁹⁰ In *Eisenstadt*, the Court concluded that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁹¹ Additionally, the *Griswold* Court stated that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."⁹² Accordingly, *Griswold* and its progeny suggest that the state cannot implement regulations that unnecessarily invade the "area of protected freedoms."⁹³

With promotion of individual rights as the cornerstone of the American legal system, state intervention during pregnancy is troubling.⁹⁴ The law clearly recognizes that pregnant women have individual rights deserving of constitutional protection.⁹⁵ Such rights include the right to reproduc-

86. *See id.* at 485.

87. *See id.* at 485-86.

88. *See Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977) (striking down an ordinance that restricted the ability of certain relatives to live together); *see also Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1351-57 (1980).

89. 405 U.S. 438 (1972) (holding unconstitutional a Massachusetts statute which banned the distribution of contraceptives to unmarried persons).

90. *See id.* at 453.

91. *Id.*

92. 381 U.S. at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

93. *See id.* (quoting *NAACP*, 377 U.S. at 307 (1964)).

94. *See* MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 40-41 (1991) (discussing the American tendency to define rights in absolute terms and how the right of privacy model has steadily replaced the property rights model as the basis of law).

95. For a more in-depth analysis of the constitutional issues involved, *see* Gallagher, *supra* note 18; Johnsen, *supra* note 27; Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988) [hereinafter *Maternal Rights and Fetal Wrongs*]; Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990).

tive and familial privacy,⁹⁶ the right to bodily integrity,⁹⁷ and the right to equal protection under the law.⁹⁸ The fear is that legal recognition of the fetus as an independent person prior to birth will undermine a key holding of *Roe v. Wade*.⁹⁹ Such a view, it is argued, leads to a lack of respect for a woman's autonomy.¹⁰⁰

3. The Significance of *Roe v. Wade*

Constitutional analysis which balances the rights of the pregnant woman against the state's interest in protecting the fetus places the rights of the mother in direct conflict with the interests of the fetus.¹⁰¹ Fetal rights advocates assume that the rights of the fetus should prevail over the rights of the pregnant woman. Currently, the law fails to recognize any constitutional right to life on the part of the fetus.¹⁰² In fact, the Su-

96. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (holding that the state may not "unduly burden" a woman's right to choose to abort a fetus before viability); see also *Moore v. East Cleveland*, 431 U.S. 494, 498-99 (1977) (striking down zoning ordinances that impaired the ability of families to live together).

97. See *Casey*, 505 U.S. 833, 846 (holding that compelling a woman to carry a pregnancy to term infringes upon her right to bodily integrity by imposing physical demands, invasions, and health risks); see also *Winston v. Lee*, 470 U.S. 753, 767 (1985) (invalidating a court order for the surgical removal of a bullet from a murder suspect under the theory of bodily integrity); *Rochin v. California*, 342 U.S. 165 (1952) (finding mandatory stomach pumping unconstitutional because the right of bodily integrity outweighs the state's interest in procuring evidence for criminal prosecution).

98. See *Wengler v. Druggist Mutual Ins. Co.*, 446 U.S. 142, 147-48 (1980) (striking down a state statute that paid workers' compensation benefits to widows of deceased workers but denied benefits to widowers).

99. 410 U.S. 113, 163 (1973) (holding that Texas criminal abortion statutes which prohibited abortions at any stage of pregnancy except to save the life of the mother were unconstitutional). The *Roe* Court concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

100. See Aaron Epstein, *Medicine Changing Legal View of Fetuses*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 4, 1996, at A23.

101. See Cynthia Gorney, *Whose Body Is It Anyway? The Legal Maelstrom That Rages When the Rights of Mother and Fetus Collide*, WASH. POST, Dec. 13, 1988, at D2 (criticizing the emphasis of fetal rights over maternal rights in criminal law because it pits the mother against the fetus as adversaries and fails to solve the problems related to fetal cocaine exposure).

102. See *Roe*, 410 U.S. at 158 (denying fetal rights); see also Julie N. Qureshi, Note, *People v. Davis: California's Murder Statute and the Requirement of Viability for Fetal Murder*, 25 GOLDEN GATE U. L. REV. 579, 588 (1995) (stating that the use of separate feticide statutes instead of general murder statutes removes the explosive viability issue from the argument over whether the state has a perpetual interest in the potential life when the fetus is being abused by the mother's negligence.). The state draws a distinction as to when it can intervene, between harming a fetus a mother intends to birth and terminating a pregnancy as a legal, conscious choice. See

preme Court held in *Roe v. Wade* that the fetus is not a person under the Fourteenth Amendment and is thus not entitled to the constitutional protection it provides.¹⁰³ However, *Roe* did recognize a state interest in protecting potential life.¹⁰⁴ Furthermore, since *Roe*, the Supreme Court increased the state interest in protecting the fetus and gave the state more authority to intervene during pregnancy.¹⁰⁵

While it is true that *Roe* acknowledged the state's compelling interest in the fetus at viability, the Court placed a limit on the exercise of this interest by expressly permitting a woman to obtain an abortion even after fetal viability if "it is necessary to preserve [her] life or health."¹⁰⁶ Additionally, the state may not adopt post-viability abortion regulations that trade off risks to the health of the pregnant woman against benefits to the health of her fetus.¹⁰⁷ It is incorrect to assert that *Roe* grants the state unrestricted authority to protect the fetus or to prohibit abortions after viability.

State intervention during pregnancy is constitutional where the state interest in protecting the fetus outweighs the constitutional rights of the pregnant woman.¹⁰⁸ If there is substantial evidence that prenatal drug use causes severe and lasting harm to a child, the state still must demonstrate that the chosen form of intervention is reasonably likely to prevent

id.

103. See *Roe*, 410 U.S. at 158. *But see* Cole, *supra* note 12, at 2664 (commenting that a pregnant woman owes a greater responsibility to her fetus than one individual owes to another). See generally Christina L. Misner, *What if Mary Sue Wanted an Abortion Instead? The Effect of Davis v. Davis on Abortion Rights*, 3 AM. U. J. GENDER & L. 265, 287 (1995) (stressing that the fetus is in an unusual position because it is not given the rights of a living human, but it is more than a non-sentient grouping of cells).

104. See *Roe*, 410 U.S. at 154.

105. See *Planned Parenthood v. Casey*, 505 U.S. 833, 872-73 (1992) (holding that states may intervene "[e]ven in the earliest stages of pregnancy" as long as such intervention does not impose an "undue burden" on a woman's ability to decide whether to terminate the pregnancy); see also Bicka A. Barlow, Comment, *Severe Penalties for the Destruction of "Potential Life"—Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 469 (1995) (arguing that if the privacy rights of the mother are not implicated, then the state's interest in the well-being of the fetus can prevail).

106. *Roe*, 410 U.S. at 162-64.

107. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 769 (1986); see also Annas, *supra* note 39, at 213-32 (stating that forcing a pregnant woman to accept an invasive procedure or to undertake a health risk against her will burdens her decision to have a child).

108. See *Roe*, 410 U.S. at 163-64 (creating a trimester system).

or alleviate the harm.¹⁰⁹ Criminalizing maternal substance abuse does not provide the least restrictive means that the constitutional standard demands.¹¹⁰ Alternatives such as education, drug treatment programs, and prenatal care can achieve more successful results for the fetus and, at the same time, be less invasive to a woman's autonomy rights.¹¹¹

III. CRIMINALIZING MATERNAL SUBSTANCE ABUSE

A. *Types of Statutes Being Used to Prosecute Women*

Criminal statutes used to prosecute women for conduct that results in the injury or death of their fetuses or newborns include various types of statutes relating to child abuse and neglect,¹¹² delivery or distribution of controlled substances to minors,¹¹³ and involuntary manslaughter.¹¹⁴ Many of these charges are based on the assumption that fetuses are legal persons, and all implicitly hold women criminally liable for their prenatal conduct.¹¹⁵ By invoking criminal sanctions in this context, society directly punishes women for their behavior during pregnancy.¹¹⁶

State prosecutors choose different avenues of prosecution for a number of reasons. The most obvious reason is the complete absence of criminal statutes that directly proscribe maternal conduct that causes

109. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 642-43 (1974) (holding that mandatory termination provisions of maternity rules violate the Due Process Clause of the Fourteenth Amendment); *Shelton v. Tucker*, 364 U.S. 479, 480 (1960) (holding invalid a state statute requiring teachers to file affidavits listing all affiliations as a condition of employment).

110. See *Roe*, 410 U.S. at 155 (noting that in cases involving fundamental rights, "legislative enactments must be narrowly drawn to express only the legitimate interest at stake").

111. See *Maternal Rights and Fetal Wrongs*, *supra* note 95, at 995-1012 (discussing the constitutionality of criminal liability for maternal harm to a fetus).

112. For example, charges have been filed under criminal child abuse and neglect statutes in California, Florida, Connecticut, Michigan, Ohio, Arizona, Colorado, Indiana and South Carolina. See *infra* notes 119-34 and accompanying text.

113. For example, charges have been filed under delivery or distribution statutes in Illinois, South Carolina, Colorado, Florida and Michigan. See *infra* notes 135-50 and accompanying text.

114. To date, the only charge of involuntary manslaughter was brought in Rockford, Illinois. See *infra* notes 151-54 and accompanying text.

115. See *supra* notes 108-14 and *infra* notes 116-19, 123-24 and accompanying text.

116. The Uniform Act states that the mere condition of alcoholism is not criminal conduct. See UNIF. ALCOHOL AND INTOXICATION TREATMENT ACT, § 1.19, 9(1) U.L.A. 104-05 (1988). Similarly, a state may not criminalize the condition of drug addiction. See, e.g., *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding a state law requiring narcotic addiction to be punished by imprisonment cruel and unusual punishment in violation of the Fourteenth Amendment).

prenatal injuries to the fetus.¹¹⁷ It is worth noting that in states where pregnant substance abusers are charged with child abuse or neglect, no legislature has specified that a woman's prenatal use of drugs should be included in these statutes. This is most likely due to the fact that right to privacy arguments would deem such statutes unconstitutional.¹¹⁸

1. Child Abuse Statutes

Prosecutions of pregnant women who use drugs center on child abuse or neglect.¹¹⁹ At first glance, child abuse statutes appear to directly address the type of conduct that state prosecutors attempt to criminalize. Upon closer inspection, however, the majority of these statutes do not expressly protect the fetus.¹²⁰ Therefore, to convict a woman under a child abuse statute, the court must extend the definition of "child" to include a fetus.¹²¹ Even if the statute expressly protects "those conceived but not yet born," there must be evidence of legislative intent for the statute to apply to the mother's conduct.¹²²

In *California v. Stewart* the state sought to prosecute Pamela Stewart for prenatal conduct which subsequently led to the death of her child.¹²³ A California child support statute was the basis for charges brought against Stewart,¹²⁴ who failed to follow her doctor's orders while pregnant.¹²⁵ The California Municipal Court of San Diego found

117. See Gallagher, *supra* note 18, at 40-41 (commenting that *Roe's* observation that United States law has never treated the unborn as persons in the legal sense remains true today).

118. For a discussion of the right to privacy issues inherent in fetal rights cases, see *supra* notes 85-100 and accompanying text.

119. See Kristen Barrett, Note, *Prosecuting Pregnant Addicts for Dealing to the Unborn*, 33 ARIZ. L. REV. 221, 229 (1991).

120. See Kantrowitz et al., *Cocaine Babies: The Littlest Victims*, NEWSWEEK, Oct. 2, 1989, at 55.

121. See *id.*

122. See Marcia Chambers, *Charges Against Mother of Baby are Thrown Out*, N.Y. TIMES, Feb. 27, 1987, at A25 (stating that the legislative purpose behind California Penal Code section 270 was to provide financial support for children, and that the inclusion of the fetus was simply an expansion of the class of people whose financial security would be protected).

123. No. M508197, slip op. at 1-11 (San Diego Mun. Ct. Feb. 26, 1987).

124. See *id.* at 7; Marcia Chambers, *Dead Baby's Mother Faces Criminal Charge on Acts in Pregnancy*, N.Y. TIMES, Oct. 9, 1986, at A22.

125. See *Stewart*, No. M508197, slip op. at 1-11. Stewart's obstetrician advised her to stay off her feet, refrain from sex, and go to the hospital if she started to bleed.

that the child neglect statute was not intended to create criminal liability for maternal conduct that causes prenatal injury.¹²⁶ Instead, the court concluded that the legislative history clearly indicated that the statute only was intended to compel parents to financially support their children, not to prosecute women for conduct that causes injury to the fetus.¹²⁷ In reaching its conclusion, the court relied on the statute's original purpose: to provide a woman financial support if the father of the child deserted her while she was pregnant, and to ensure that the woman had sufficient funds available for prenatal care and other medical expenses resulting from her pregnancy.¹²⁸ The court concluded that prosecuting Pamela Stewart under this statute was a clear abuse of discretion.¹²⁹

Where criminal abuse and neglect statutes do not specifically extend protection to unborn children, most courts will refuse to imply that child neglect statutes are designed to protect the fetus.¹³⁰ In *Reyes v. Superior Court*,¹³¹ the California Court of Appeal held that the state's felony child endangerment statute was not an appropriate basis for a criminal conviction for maternal conduct that caused prenatal injuries because the statute did not expressly refer to an unborn child or fetus.¹³² Ac-

See id.

126. *See id.* at 7-10. The statute reads, in pertinent part, as follows:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary . . . medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

CAL. PENAL CODE § 270 (West 1988).

127. *See Stewart*, No. M508197, slip op. at 8-9.

128. *See id.*

129. *See id.* at 10.

130. *See id.*; *see also* *Reinesto v. Superior Court*, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (stating that defendant could not be prosecuted under a child abuse statute for prenatal conduct that caused harm to the child after birth); *State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. 1991) (stating that because a child abuse statute did not reach an unborn fetus, defendant could not be prosecuted for child abuse based upon the introduction of cocaine into her body during the gestation period of her unborn child). *But see In re Ruiz*, 500 N.E.2d 935, 939 (Ohio 1986) (stating that a child whose mother admitted using heroin intravenously at least two weeks prior to the child's delivery, and who was born addicted to heroin, was abused by the mother within the meaning of a statute prohibiting a parent from creating substantial risk to the health or safety of its child); *Collins v. State*, 890 S.W.2d 893, 898 (Tex. App. 1994) (stating that a mother could not be prosecuted under an injury to child statute for ingesting cocaine while pregnant even if it causes the fetus to suffer pain or to be impaired).

131. 141 Cal. Rptr. 912 (Ct. App. 1977).

132. *See id.* at 912-15. The court stated that "we are persuaded that the word 'child' as used in Penal Code section 273a(1) was not intended to refer to an un-

cordingly, charges brought under the statute against a mother, whose heroin use during pregnancy led to the birth of twins addicted to heroin, were not allowed.¹³³ The court concluded that the statute does not apply to conduct that causes injury to a fetus because the legislature chose not to clearly and expressly include protection of the fetus within the scope of the statute.¹³⁴

2. Controlled Substance Statutes

Women also face charges under various controlled substance statutes.¹³⁵ The most commonly used drug statute is delivery or distribution of an unlawful substance to a minor.¹³⁶ This type of statute was the basis for the first criminal conviction of a mother for conduct that caused prenatal injuries.¹³⁷ On July 13, 1989, a Florida judge convicted Jennifer Clarise Johnson for delivering illegal drugs to her fetus through the umbilical cord.¹³⁸ Johnson was prosecuted after going to the hospital for treatment and honestly disclosing her drug use. This conviction marked the first time that a statute, normally used to convict drug dealers, was applied successfully in this context.¹³⁹ Because fetuses are not considered "persons" under Florida law, the prosecutor needed to prove that Johnson "pumped" or delivered cocaine into her child during the sixty-second period after birth and prior to the cutting of the umbilical cord.¹⁴⁰

born child and that the petitioner's prenatal conduct does not constitute felonious child endangering within contemplation of the statute." *Id.* at 913. The court further concluded that section 273a(1) "was not intended to be applicable to prenatal conduct." *Id.*

133. *See id.* at 913, 915.

134. *See id.* at 915. The court concluded that "[h]ad the Legislature meant to include unborn children among the class of victims described in Penal Code section 273a(1), it could easily have so provided by amending the statute" *Id.*

135. States that have attempted to or currently are charging women under controlled substance statutes include Florida, Illinois, Colorado, South Carolina, Michigan, and Indiana. *See* Catherine Foster, *Fetal Endangerment Cases Increase*, CHRISTIAN SCI. MONITOR, Oct. 10, 1989, at 8.

136. *See id.*

137. *See id.*; *Florida v. Johnson*, No. E89-890-C8A, (Seminole County Ct. July 13, 1989).

138. *See Johnson*, No. E89-890C8A, sentencing order at 1.

139. *See id.* Johnson was convicted for delivering drugs to a minor under Florida law. *See* FLA. STAT. ANN. § 893.13(1)(c)1 (West 1994 & Supp. 1996).

140. *See* Eileen McNamara, *Fetal Endangerment Cases on the Rise*, BOSTON GLOBE,

In 1991, the Florida District Court of Appeal affirmed Johnson's conviction.¹⁴¹ For purposes of the Florida statute, the court held that a child is a person after birth, but not before the umbilical cord is severed.¹⁴² The court stated that since Ms. Johnson chose to use cocaine, become pregnant, and bring the pregnancy to full term, she was criminally responsible for her actions.¹⁴³

The Supreme Court of Florida overturned Ms. Johnson's conviction in July 1992.¹⁴⁴ The court ruled that cocaine passing through an umbilical cord after birth, but before cutting the cord, did not violate the Florida statute prohibiting adult delivery of an illegal substance to a minor.¹⁴⁵ The court based its decision on the legislative history of the statute.¹⁴⁶ The history reveals no intent to use the word "delivery" in the context of criminally prosecuting mothers for delivery of a controlled substance by way of the umbilical cord.¹⁴⁷ Similarly, in *People v. Hardy*,¹⁴⁸ where the state tried to convict Kimberly Hardy for delivering cocaine to her newborn in the minute before the doctors severed the umbilical cord,¹⁴⁹ the court held the conduct did not violate the delivery of controlled substances statute.¹⁵⁰

3. Involuntary Manslaughter

In 1989, in the most dramatic and serious maternal substance abuse charge to date, state prosecutors in Rockford, Illinois charged Melanie Green with involuntary manslaughter and delivery of a controlled substance after her two-day-old daughter died.¹⁵¹ Both mother and infant

Oct. 3, 1989, at 1. Johnson admitted to using cocaine the night before delivery with her first child and during active labor with her second. See Johnson, No. E89-890-C8A, sentencing order at 1.

141. See Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991).

142. See *id.* at 419; see also FLA. STAT. ANN. § 893.13(1)(c) (West 1994) (stating that "[e]xcept as authorized by this chapter, it is unlawful for any person to sell or deliver a controlled substance in or within 1,000 feet of the real property comprising a . . . school . . .").

143. See Johnson, 578 So. 2d at 420.

144. See Johnson v. State, 602 So. 2d 1288 (Fla. 1992).

145. See *id.* at 1292.

146. See *id.* at 1292-93.

147. See *id.*

148. 469 N.W.2d 50 (Mich. 1991).

149. See *id.* at 51-52.

150. See *id.* at 53.

151. See *Mother Charged After Her Baby Dies of Cocaine*, N.Y. TIMES, May 10, 1989, at A18 [hereinafter *Mother Charged*]. Green was charged under Illinois law. See ILL. REV. STAT. ch. 38, para. 9-3 (1988).

tested positive for cocaine.¹⁵² The prosecutor alleged that Green's cocaine use during pregnancy was reckless and showed disregard for her child's life.¹⁵³ Charges were later dropped when the county grand jury refused to indict Green on the ground that the legislature did not intend for the manslaughter statute to impose criminal liability on women for the death of a fetus.¹⁵⁴

B. *The Ineffectiveness of Prosecution*

Although appellate courts systematically overturn criminal convictions of pregnant drug users, zealous prosecutors continue to pursue these women, turning the war on drugs into a war on women. The state faces several problems if it chooses to enact a new statute specifically criminalizing substance abuse during pregnancy or to prosecute pregnant substance abusers under existing criminal statutes. First, the traditional rationales for criminal liability do not justify prosecuting pregnant substance abusers.¹⁵⁵ Second, by bringing a criminal prosecution against the mother, the state adopts an adversarial approach, rather than a facilitative approach. Such prosecutions place the mother and the fetus or newborn in conflicting positions and ignore and obscure their common needs and interests.¹⁵⁶ If the state is successful, the mother is incarcerated and separated from her child.¹⁵⁷ The fear of incarceration is likely to discourage pregnant women from seeking prenatal care.¹⁵⁸ Health care experts unanimously agree that failure to receive prenatal care is extremely harmful to both the mother and the fetus.¹⁵⁹ There-

152. See *Mother Charged*, *supra* note 151.

153. See *id.*

154. See Patrick Reardon, *Grand Jury Won't Indict Mother in Baby's Drug Death*, CHI. TRIB., May 27, 1989, at 1; see also Paul A. Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, 9 CRIM. JUST. ETHICS 23, 24 (1990).

155. See *infra* notes 161-74 and accompanying text.

156. See Cheryl E. Amana, *Maternal-Fetal Conflict: A Call for Humanism and Consciousness in a Time of Crisis*, 3 COLUM. J. GENDER & L. 351, 358-65 (1992) (discussing fetal rights in the substantive areas of probate, criminal, and tort law).

157. See *id.*

158. See Marcy Tench Stovall, Note, *Looking for a Solution: In re Valerie D. and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV. 1265, 1268 (inferring a connection between maternal substance abuse statutes and maternal substance abusers' refusal to seek prenatal care); see also *infra* notes 175-87.

159. See *id.* at 1267 (arguing that a facilitative approach will encourage maternal substance abusers to seek treatment without fear of prosecution); see also *infra*

fore, criminal prosecution of pregnant substance abusers may cause potential harm to the fetus by discouraging women from seeking prenatal care.¹⁶⁰

1. Traditional Justifications Inapplicable

Traditional justifications for punishments, such as restraint, general and specific deterrence, retribution, and rehabilitation, do not support the imposition of criminal liability.¹⁶¹ Criminal liability restrains a pregnant woman from continued substance abuse only if the law is enforced quickly enough to incarcerate her while she is still pregnant. Punishment after the fact does not prevent harm caused to a fetus by its mother's use of drugs.

Criminal sanctions are unlikely to either generally or specifically deter pregnant substance abusers.¹⁶² Neither incarceration, nor the knowledge that others are incarcerated, will encourage a woman to remain substance free during future pregnancies. The American Medical Association has stated that "it is clear that addiction is not simply the product of a failure of individual willpower" but rather caused by complex hereditary, environmental, and social factors.¹⁶³ As the National Association for Perinatal Addiction Research and Education (NAPARE) points out: "These women are addicts who become pregnant, not pregnant women who decide to use drugs"¹⁶⁴ Their substance abuse is best addressed through treatment, not punishment.¹⁶⁵

Retribution is perhaps the least persuasive reason to impose criminal liability on pregnant substance abusers. Although the goal of many state sentencing plans is retribution,¹⁶⁶ punishing pregnant substance abusers who lack mental culpability fails to further this aim.¹⁶⁷ Proponents of criminalizing maternal substance abuse assert that they are not seeking

notes 179-81.

160. See *infra* notes 182-87 and accompanying text.

161. See generally LAFAYE & SCOTT, *supra* note 65, § 1.5.

162. See *infra* notes 163-65 and accompanying text.

163. Cole, *supra* note 12, at 2667 (quoting Drug Abuse in the United States; a Policy Report, in: Proceeding of the House of Delegates, 137th Annual Meeting of the Board of Trustees of the American Medical Association; June 26-30, 1988).

164. NATIONAL ASSOCIATION FOR PERINATAL ADDICTION RESEARCH AND EDUCATION, POLICY STATEMENT NO. 1, CRIMINALIZATION OF PRENATAL USE: PUNITIVE MEASURES WILL BE COUNTER-PRODUCTIVE (1990).

165. See Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483, 485 (1990).

166. See, e.g., WASH. REV. CODE. § 9.94A010(1) (1989).

167. The Supreme Court first recognized drug addiction as a disease in *Linder v. United States*, 268 U.S. 5, 18 (1925).

retribution against the women they prosecute. Their concern is "to send a message to other pregnant drug abusers that they should seek medical help and counseling."¹⁶⁸ An Illinois lawmaker expressed similar sentiments after a grand jury refused to indict one maternal substance abuser by stating, "[it] is not easy to enforce morality with some people but people have to be made to take responsibility. Why don't these women get help?"¹⁶⁹ This simplistic view does not reflect the reality of the situation. As the experiences of many of the prosecuted women demonstrate, there is limited treatment available to them.¹⁷⁰

Although rehabilitation often fails, it is the strongest justification for holding pregnant substance abusers criminally liable. However, the criminal justice system is an ineffective institution for providing rehabilitative treatment for an addict. Putting women in jail is simply not a substitute for providing drug treatment services. Imprisoning women during their pregnancies or shortly after giving birth causes the mother and the children to receive less than adequate care.¹⁷¹ Furthermore, states may be under no duty to provide inmates with the same type of addiction treatments as civilians.¹⁷² Putting women in jail where drugs are available,¹⁷³ but treatment and prenatal care are not, jeopardizes the health

168. *Mother Charged with Delivering Cocaine to Her Baby*, ASSOC. PRESS, Nov. 13, 1989, available in 1989 WL 4070303 (citing the statement of Tony Tague, prosecutor of Kimberly Hardy).

169. McNamara, *supra* note 140 (quoting the statement of State Senator Richard Kelly after a grand jury refused to indict Melanie Green).

170. Jennifer Johnson, a Florida woman convicted of delivering cocaine to her children, represents an example of the limited availability of treatment as her quest to get treatment only served to allow prosecutors to use the paper-trail as evidence to convict. *Florida v. Johnson*, No. E89-890-C8A, sentencing order at 1 (Seminole Cty. Ct. July 13, 1989). At the time of her arrest, Jennifer Johnson's home state had more than 2,000 people waiting for treatment. *See id.* For a discussion of the *Johnson* case, see *supra* text accompanying notes 137-47. Melanie Green was also prosecuted. Eileen McNamara, *Fetal Endangerment Cases on the Rise*, BOSTON GLOBE, Oct. 3, 1989, at 1. Her effort to enter the only in-patient drug treatment program failed after she was charged with manslaughter for the death of her allegedly substance-exposed newborn. *See id.* The program had a six-month waiting list. For a discussion of the *Green* case, see *supra* text accompanying notes 151-54.

171. *See Cole*, *supra* note 12, at 2667 (commenting that while prisons have generally inadequate health resources, they are "shockingly deficient" in tending to the needs of pregnant women).

172. *See, e.g., Aripa v. Department of Soc. and Health Servs.*, 588 P.2d 185, 187-88 (Wash. 1978) (noting that Washington's version of the Uniform Alcoholism and Intoxication Treatment Act does not give prisoners a right to treatment).

173. "Jail [is] no place to get away from drugs." *Fetal Endangerment Cases In-*

of pregnant women and their future children while doing little to solve the underlying problem of addiction.¹⁷⁴

2. Deterring Women from Prenatal Care

Because doctors are required to report suspected child abuse, the fear of being reported to the authorities discourages women from honestly communicating their addictions to health care professionals who need such information to provide appropriate medical care to both the woman and her newborn.¹⁷⁵ The American Society of Addiction Medicine (ASAM) considers criminalizing maternal substance abuse to be "inappropriate and counterproductive."¹⁷⁶ ASAM asserts that criminal prosecution of chemically dependent women results in "deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing rather than preventing, harm to children and society as a whole."¹⁷⁷ The possibility of a mother not seeking adequate prenatal care, which is the most important complicating factor during pregnancy, is an extremely compelling reason not to prosecute.¹⁷⁸ For many women, the lack of adequate prenatal care is more detrimental to the health of the developing fetus than the mother's use of drugs during pregnancy.¹⁷⁹ A 1989 University of California Research team reviewed records of more than 146,000 births between 1982 and 1986 in California and found that babies born to parents with no health insurance—a group whose numbers had grown forty-five percent in those same years—were thirty percent more likely to die, be seriously ill at birth, and suffer low birth weight.¹⁸⁰ A similar 1985 Florida report tracing the dire effects of

crease, CHRISTIAN SCI. MONITOR, Oct. 10, 1989, at 8 (quoting Walter Connolly Jr., attorney for the NAPARE); see Andrew H. Malcolm, *Explosive Drug Use Creating New Underworld in Prisons*, N.Y. TIMES, Dec. 30, 1989, at 1.

174. See Ellen Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L.J. 189, 191 (1989) (commenting on the insufficient standard of care in the treatment of pregnant prisoners); see also Ellen Barry, *Pregnant, Addicted and Sentenced: Debunking the Myths of Medical Treatment in Prison*, 5 J. CRIM. JUST., Winter 1977, at 22.

175. See *Police Seek Doctors' Help on Fetus Abuse*, TAMPA TRIB., July 18, 1996, at 9.

176. See American Society of Addiction Medicine statement in support of Jennifer Johnson, reprinted in Vol. 4, No. 13 Manisses Communications Group, *Alcoholism & Drug Abuse Week* (March 25, 1992) [hereinafter ASAM statement].

177. See *id.*

178. See S.N. MacGregor, *Cocaine Use During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 OBSTETRICS & GYNECOLOGY 882 (1989).

179. See *Taxpayers Pay for Lack of Prenatal Treatment*, ST. PETERSBURG TIMES, Nov. 3, 1986, at 7B.

180. See Paula Braverman et al., *Adverse Outcomes and Lack of Health Insurance Among Newborns in an Eight-County Area of California, 1982 to 1986*, 321 NEW

the lack of prenatal care concluded that "[i]n the end, it is safer for the baby to be born to a drug abusing, anemic, or diabetic mother who visits the doctor throughout her pregnancy than to be born to a normal woman who does not."¹⁸¹

Leading public health organizations, including the American Medical Association and the American Public Health Association, oppose the prosecution of pregnant women who use drugs.¹⁸² These groups recognize that this approach undermines maternal and fetal health because the threat of criminal charges and the fear of losing their children deter women from seeking prenatal care and drug treatment.¹⁸³ Government and private researchers conclude that punitive approaches frighten women away from needed care.¹⁸⁴ One federal report found that "[w]omen are reluctant to seek treatment if there is a possibility of punishment," civil or criminal, noting that "some women are now delivering their infants at home in order to prevent the state from discouraging their drug use."¹⁸⁵ Many groups that are primarily concerned with the health and

ENG. J. MED. 508, 508-13 (1989).

181. FALUDI, *supra* note 77, at 428.

182. See Chasnoff et al., *supra* note 12, at 2667 (stating that pregnant women will likely avoid seeking prenatal or other medical care for fear that their physician's knowledge of their substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment); AMERICAN PUBLIC HEALTH ASSOCIATION, POLICY STATEMENT NO. 9020, ILLICIT DRUG USE BY PREGNANT WOMEN, reprinted in 81 AM. J. PUB. HEALTH 253 (1991) (recommending that no punitive measures be taken against pregnant women who are users of illicit drugs when no other illegal acts, including drug-related offenses, have been committed).

183. See ASAM STATEMENT, *supra* note 176 (arguing that the criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and drug treatment, thereby increasing rather than preventing harm to children and to society as a whole); see also AMERICAN NURSES ASSOCIATION, TASK FORCE ON DRUGS AND ALCOHOL ABUSE/ADDICTIONS POSITION STATEMENT (Apr. 5, 1991) (opposing any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants).

184. U.S. GENERAL ACCOUNTING OFFICE, GAO/HRD-91-80, ADMS BLOCK GRANT, WOMEN'S SET-ASIDE DOES NOT ASSURE DRUG TREATMENT FOR PREGNANT WOMEN 20 (1991) [hereinafter WOMEN'S SET-ASIDE].

185. U.S. GENERAL ACCOUNTING OFFICE, GAO/HRD-90-138, DRUG-EXPOSED INFANTS, A GENERATION AT RISK 37, 39 (1990). Many women treatment experts contend that "as stigma, rejection and blame increase, drug-abusing women's feelings of guilt and shame increase. This leads to lowered self-esteem, increased depression, immobilization, and isolation. As societal stigma increases, willingness to enter treatment decreases." Karol L. Kumpfer, *Treatment Programs for Drug-Abusing Women*, 1 FUTURE OF CHILDREN 50, 55-56 (1991).

rights of children, such as the American Academy of Pediatrics, the Center for the Future of Children, and the March of Dimes, also oppose punitive approaches to substance abuse and pregnancy.¹⁸⁶ In 1990, the American Academy of Pediatrics Committee on Substance Abuse expressed the sentiments of many public health and public advocacy groups when it stated:

The Academy believes that the most appropriate way to prevent intrauterine drug exposure is to educate women of childbearing age about the hazards of drugs to the fetuses and to encourage drug avoidance. If this fails, effective drug treatment programs should be made readily available to pregnant women and to women anticipating and/or at risk for pregnancy. Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health The American Academy of Pediatrics is concerned that such involuntary measures may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.¹⁸⁷

IV. ADDRESSING THE TRUE CRISIS: LACK OF DRUG TREATMENT PROGRAMS

To fully understand the complexity of the problem of maternal substance abuse and the dangers of prosecuting pregnant drug users, it is necessary to examine the barriers confronting these women. Proponents of a crackdown on pregnant drug users argue that if women seek treatment for drug habits, they can avoid prosecution.¹⁸⁸ Yet, treatment for pregnant addicts is largely unavailable.

A. Insufficiency of Current Treatment Options for Pregnant Addicts

With treatment opportunities limited for all drug users, pregnant drug users face a more acute shortage of treatment facilities than any other segment of the population.¹⁸⁹ Despite the fact that drug treatment pro-

186. See Center for the Future of Children, *Recommendations*, 1 FUTURE OF CHILDREN 8, 9 (1991) (maintaining that a woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecution on the basis of allegations that her illegal drug use harms the fetus).

187. American Academy of Pediatrics, Committee on Substance Abuse, *Drug-Exposed Infants*, 86 PEDIATRICS 639, 641 (1990).

188. See *supra* notes 168-70 and accompanying text.

189. See FALUDI, *supra* note 77, at 429. Pregnant addicts who seek treatment for their addictions generally find that help is unavailable because treatment programs refuse to treat pregnant women. See *id.* Further, the United States government focuses less than one percent of anti-drug funding on women, resulting in pregnant addicts receiving less than one percent of government funds. See *id.*

grams tailored for women help them overcome their addiction problems, greatly improve birth outcomes, and are cost-effective, such programs are extremely rare and overburdened.¹⁹⁰ The 1991 Federal General Accounting Office (GAO) Report found that the most critical barrier to women's treatment "is the lack of adequate treatment capacity and appropriate services among programs that will treat pregnant women and mothers with young children. The demand for drug treatment uniquely designed for pregnant women far exceeds the supply."¹⁹¹ A 1989 study of 95% of the drug treatment programs in New York City found that 54% refused to treat any pregnant women, 67% would not accept pregnant women on Medicaid, and 87% refused to treat pregnant women on Medicaid who were addicted to crack cocaine.¹⁹² Additional surveys conducted by the National Institute on Drug Abuse (NIDA) showed that the few programs admitting women neither offer prenatal care, nor provide day care for the women's children.¹⁹³ Pregnant women face equally bleak prospects for treatment in other cities.

Despite significant evidence that long-term residential care may be the most effective method of treatment for chronic alcohol or drug dependent pregnant and parenting women, such services are virtually nonexistent.¹⁹⁴ One survey of hospitals nationwide revealed that there is no place to refer pregnant women for treatment in two-thirds of the hospitals.¹⁹⁵ Although a hospital in Boston, Massachusetts reported over three hundred women having babies at the facility used cocaine, the city of Boston possessed approximately thirty residential treatment slots available for pregnant cocaine addicts.¹⁹⁶ There are sixty women

190. See CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PRODUCING RESULTS: A REPORT TO THE NATION 5-15 (1995) (finding that drug treatment costs significantly less than imprisonment and reduces costs associated with medical care and welfare).

191. WOMEN'S SET-ASIDE, *supra* note 184, at 4. "One 1990 survey estimates that less than 14 percent of the 4 million women needing drug treatment received such treatment." *Id.* at 1.

192. See Chavkin, *supra* note 165, at 485. Chavkin surveyed 78 programs, 95% of the total available in New York City. See *id.* In late 1989, the A.C.L.U. filed a lawsuit on behalf of New York women unable to find drug treatment. See *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 580 N.Y.S.2d 246, 247 (N.Y. App. Div. 1992), *rev'd* 613 N.E.2d 523 (N.Y. 1993).

193. See Chavkin, *supra* note 165, at 485.

194. See Kumpfer, *supra* note 185, at 53.

195. See *id.*

196. See *id.* at 54.

waiting for six beds in one California residential program.¹⁹⁷ Although San Francisco had 700 drug-exposed babies in 1989, it began to develop its first residential treatment center for pregnant women only late that year, and the center will accommodate only fifteen women at a time.¹⁹⁸ A recent United States General Accounting Office Report suggests that physicians frequently ignore substance abuse symptoms in pregnant women or make referrals to treatment.¹⁹⁹

B. Inadequacy of Current Treatment Programs for Women

Because drug treatment centers routinely deny pregnant women access to treatment, only a small number of addicted women ever enter a drug treatment program.²⁰⁰ Pregnant addicts seeking drug treatment either face great difficulty in obtaining help or are unable to receive treatment at all.²⁰¹ There are two reasons commonly given in explaining why substance abuse treatment programs refuse to treat pregnant addicts.²⁰² First, drug treatment programs have a long history of insensitivity to pregnant women.²⁰³ Treatment programs for alcoholism and drug addiction are largely male oriented.²⁰⁴ Treatment centers use techniques that were developed to help confront common problems among men with "little attention . . . paid to specific women's treatment issues, including the different emotional, social, and economic realities of women's lives."²⁰⁵ As a result, a pregnant addict receiving

197. See *Missing Links: Coordinating Federal Drug Policy for Women, Infants, and Children: Hearing Before the Senate Comm. on Gov't Affairs*, 101st Cong. 18-19 (1989) (testimony of Minnie Thomas, Director of Mandella House).

198. See Diane Allers, *Women and Crack*, BOSTON GLOBE, Nov. 1, 1989, at 4 (stating that while women account for about one-half of all crack addicts, they comprise less than one-third of those entering publicly funded treatment programs).

199. See WOMEN'S SET-ASIDE, *supra* note 184, at 4-5.

200. See FALUDI, *supra* note 77, at 428.

201. See McNulty, *supra* note 44, at 301 n.167 (1988) (noting the widespread health industry practice of denying pregnant substance abusers admission to drug treatment centers).

202. See Wendy Chavkin et al., *Drug Abuse and Pregnancy: Some Questions on Public Policy, Clinical Management, and Maternal and Fetal Rights*, 18 BIRTH 107 (1991).

203. See *id.*

204. See *id.* at 111. Male-oriented rehabilitation programs only address the addiction itself. See Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1436 n.194 (1990) (arguing that male focused treatment does not address women's concerns such as prenatal care, parental training, and job skills).

205. Kumpfer, *supra* note 185, at 55 (quoting N. Finkelstein, Treatment Issues: Women and Substance Abuse (Sept. 1990) (unpublished paper presented at the OSAP Conference, Healthy Women, Healthy Pregnancies, Healthy Infants: Emerging Solutions

treatment designed for a male has a much more difficult time in overcoming her addiction.²⁰⁶ Unless drug treatment programs develop a more appropriate standard for women, pregnant addicts are not likely to break their addictions.²⁰⁷

The second reason drug treatment programs often refuse to treat pregnant women is because treatment centers fear that either substance abuse treatment or the withdrawal symptoms associated with the treatment will harm the fetus and expose the centers to litigation.²⁰⁸ This fear stems from the uncertainty regarding the most effective medical method to treat pregnant drug users.²⁰⁹ The list of concerns offered by treatment centers as justifications for excluding pregnant women includes: "detoxification during pregnancy, lack of prenatal care, lack of facilities for the infant when born if the woman is in a long-term residential program, and their inability to become a licensed child care facility or nursery."²¹⁰ Additionally, although the use of methadone for detoxification or maintenance during pregnancy is fraught with controversy,²¹¹ there is a lack of extensive evaluation on the effects of alternative treatments such as psychotherapy, acupuncture, and other medications on pregnant women.²¹²

in the Face of Alcohol and Other Drug Problems)).

206. See Chavkin et al., *supra* note 202, at 111.

207. See *id.*

208. See Wilkins, *supra* note 204, at 1437.

209. See Chavkin et al., *supra* note 202, at 107.

210. Kumpfer, *supra* note 185, at 54-55 (admitting that there are formidable barriers discouraging treatment programs from meeting the needs of maternal substance abusers).

211. See Chavkin et al., *supra* note 202, at 107; see also Chavkin, *supra* note 165, at 485 (stating that crack cocaine addiction is not amenable to therapy with methadone). For further discussion of the effects of withdrawal on a fetus, see George Blinick et al., *Methadone Assays in Pregnant Women and Progeny*, 121 AM. J. OBSTETRICS GYNECOLOGY 617 (1975); Stephen R. Kandall et al., *Differential Effects of Maternal Heroin and Methadone Use on Birthweight*, 58 PEDIATRICS 681 (1976); B.K. Rajagowda et al., *Methadone Withdrawal in Newborn Infants*, 81 J. PEDIATRICS 532 (1972).

212. See Chavkin et al., *supra* note 202, at 107. For an interesting commentary on treating crack cocaine addiction with acupuncture, see Benedict Carey, *Cracking Crack With Acupuncture*, IN HEALTH, Jan.-Feb. 1990, at 16.

C. Child Care Issues

Drug addiction afflicts women from all socio-economic backgrounds, including many single parents with little education or income.²¹³ Few drug treatment centers can accommodate children. A drug treatment program that does not provide child care services "effectively precludes the participation of women in drug treatment."²¹⁴ Statistics indicate that most pregnant addicts potentially affected by criminal sanctions already have children.²¹⁵ Because rehabilitation and treatment centers were originally male-centered, they do not provide child care facilities for women who seek treatment for drug addiction but who do not have anyone to care for their family during the treatment.²¹⁶ Accordingly, because these programs do not meet the needs of the growing number of drug-dependent women who are pregnant or who have families, the only option available to many of these women is placing their children in foster care or foregoing treatment.²¹⁷ When faced with this choice it is not surprising that most women choose the latter.²¹⁸ To accommodate the needs of pregnant women with other children, treatment facilities need to offer child care services within the treatment centers. A 1986 study of treatment programs found that the main reason why drug addicted women failed to seek available treatment is the lack of child care.²¹⁹ Another study calls child care services "the linchpin without which treatment participation is impossible."²²⁰

V. CONCLUSION

There is little argument that society has a legitimate and compelling interest in ensuring that children are born healthy.²²¹ Children physi-

213. See McNulty, *supra* note 44, at 300-01 (identifying women substance abusers).

214. Wendy Chavkin, Editorial, *Help, Don't Jail, Addicted Mothers*, N.Y. TIMES, July 18, 1989, at A21.

215. See Gittler et al., *Prenatal Substance Abuse*, 19 CHILDREN TODAY 3, 4 (1990). The demographic characteristics of mothers who use drugs during pregnancy indicate the women are in their twenties and thirties and are not first-time mothers. See *id.*

216. See *supra* notes 203-07 and accompanying text.

217. See McNulty, *supra* note 44, at 301 (explaining why pregnant addicts lack access to prenatal care).

218. See *id.*

219. See Jones, *supra* note 11, at 1177 (citing Michele L. Norris, *Cries in Dark Often Go Unanswered*, WASH. POST, July 2, 1991, at A1 (referring to a National Association of Junior Leagues study conducted in thirty-four cities nationwide)).

220. Michael deCourcy Hinds, *The Instincts of Parenthood Become Part of Crack's Toll*, N.Y. TIMES, Mar. 17, 1990, at A8 (quoting Dr. Elizabeth Rahdert, a clinical research psychologist at the National Institute on Drug Abuse).

221. See, e.g., *supra* note 7.

cally and mentally damaged by prenatal substance abuse will require additional state services to meet their special medical, emotional, and educational needs.²²² Prosecuting the mother, however, fails to protect fetuses from harm.

There is compelling evidence that the threat of criminal sanctions against the mother is the least effective means of ensuring fetal health and preventing the birth of drug addicted newborns.²²³ Reports showing a decrease in the number of newborns born addicted to drugs are rare, but the positive results discovered are linked to non-punitive approaches rather than punitive ones.²²⁴ The punitive approach of the criminal justice system is ill-suited to intervene in the complex medical and sociological problems associated with drug use and pregnancy which may be more effectively and humanely addressed by drug treatment programs for pregnant addicts.²²⁵

Women's and children's advocates agree that women should engage in behaviors that promote the birth of healthy children. Nevertheless, the advocates recognize that women's substance abuse involves a complex set of problems that traditional drug treatment models do not contemplate.²²⁶ A comprehensive system of education and treatment is needed to ensure that pregnant women receive a range of desperately needed services.²²⁷ The primary services the system must provide are

222. See *supra* notes 12-13 and accompanying text.

223. See *supra* notes 175-87 and accompanying text.

224. For a discussion of three successful maternal substance abuse treatment programs, see Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 668-72 (1994) (noting that "a comprehensive program should seek to treat more than just the drug addiction of the pregnant woman").

225. See *supra* notes 155-74 and accompanying text; see also CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DHHS PUB. NO. (SMA) 93-1998, PREGNANT, SUBSTANCE-ABUSING WOMEN 19 (1993) [hereinafter PREGNANT SUBSTANCE-ABUSING WOMEN] (stating that there is no evidence that punitive approaches work).

226. For example, a pregnant woman addicted to heroin faces a catch-22 situation because if she stops "cold turkey," as some advocates urge, the resulting withdrawal can cause fetal death, and if she continues to use heroin or switches to methadone, the child will still undergo withdrawal after birth. See PREGNANT SUBSTANCE ABUSING WOMEN, *supra* note 225.

227. See Gittler et al., *supra* note 215, at 7. For further discussion of the need for a comprehensive program to help pregnant addicts, see Chavkin et al., *supra* note 202, at 108; Veronica D. Feeg, *Solving Health Problems With Treatment, Not Jail*, 18 PEDIATRIC NURSING 8 (1992); Lori A. Leu, Report, *A Proposal to Strengthen State Mea-*

education on the prevention of drug abuse and treatment that focuses specifically on women of child bearing age and pregnant women.²²⁸ These early intervention and education services must be made highly accessible, especially in or near the communities that have been the hardest hit by crack cocaine.²²⁹ Treatment programs also need to offer drug treatment, medical services, and parenting training as components of one comprehensive program.²³⁰ Furthermore, drug treatment programs must be prohibited from discriminating against pregnant women.²³¹ It seems a grave injustice to punish a pregnant addict when she cannot receive the treatment she needs to help conquer her addiction.

Those who support the prosecution of women who use drugs during pregnancy often justify this approach as a way of compelling drug users to get treatment, but criminalization misses the central problem of preventing fetal harm.²³² Punitive approaches fail to resolve addiction problems and ultimately undermine the health and well-being of women and their children.

Perhaps most importantly, criminal prosecution and the use of child protection laws against drug-addicted mothers are deficient solutions because state involvement occurs only after birth and cannot achieve the goal of ensuring healthy babies.²³³ Rehabilitation must come during or prior to pregnancy in order to benefit the children of drug addicted women.²³⁴ It may be argued that the lack of drug treatment, the deterrent effects of prosecution, and the harmful consequences of sending women to jail all weigh heavily against choosing prosecution as the solution to this problem if the goal is to get pregnant addicts into treatment. Punitive approaches to the problem of substance abuse during pregnancy threaten the health of women and children and seriously erode women's rights to privacy.²³⁵

asures for the Reduction of Infant Mortality, 23 HARV. J. ON LEGIS. 559, 562-64 (1986).

228. See Gittler et al., *supra* note 215, at 5.

229. See *id.* at 5-6.

230. See Chavkin et al., *supra* note 202, at 107-08, 111.

231. See Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 298 (1990).

232. See NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, POLICY STATEMENT, HIGH RISK PREGNANCIES/SUBSTANCE ABUSE (Oct. 1990) (stating that a punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their drug addiction).

233. See Stovall, *supra* note 158, at 1298-99.

234. See *id.* at 1266.

235. See *supra* notes 85-100 and accompanying text for a discussion of privacy rights issues.

There are alternatives to the criminalization of maternal substance abuse that avoid creating negative conceptions of women and avoid infringing on maternal privacy rights. These alternatives include government expansion of educational efforts aimed at pregnant women and promotions of the availability and quality of comprehensive prenatal care.²³⁶ With the goal of promoting the birth of healthy children, the appropriate response to maternal substance abuse is to focus on education, early intervention, and rehabilitation, not retribution.

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236. See Leu, *supra* note 227, at 560-61 (proposing a federally and state funded system of prenatal care as a means of lowering the infant mortality rate).

